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Supreme Court of the United States

OCTOBER TERM, 1992

LUTHER R. CAMPBELL, a/k/a LUKE SKYYWALKER,
CHRISTOPHER WONGWON, a/k/a FRESH KID ICE,
MARK ROSS, a/k/a BROTHER MARQUIS,
DAVID HOBBS, a/k/a MR. MIXX;
professionally known as THE 2 LIVE CREW;
LUKE SKYYWALKER RECORDS,
Petitioners,

v.

ACUFF-ROSE MUSIC, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICI CURIAE CAPITOL STEPS PRODUCTION, INC., MARK RUSSELL, BARRET E. HANSEN, BRUCE W. KERR, NANCY HOLSON, AND MICHAEL R. HUEY IN SUPPORT OF THE PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THE UNDERLYING PURPOSE OF THE COPYRIGHT LAW, AND THE SOCIAL VALUE OF SATIRE AND PARODY, WEIGH HEAVILY IN SUPPORT OF ANY CLAIM THAT A SPECIFIC SONG PARODY IS A "FAIR USE."	4
A. The Fair Use Defense Is Essential to Parody and Satire	5
B. The American Tradition of Musical Parody and Satire Is Worth Protecting	7
C. Congress Intended That Parodies Be Protected as Fair Use When It Enacted Section 107	9
II. THE PETITIONERS' SONG "PRETTY WOMAN" IS A FAIR USE OF THE COPYRIGHTED WORK	10
A. Legitimate Parodists, Such as the Petitioners, Should Prevail on the First Fair Use Factor	10
1. The Sixth Circuit Erred in Finding That The Commercial Nature of a Parody Was Dispositive of the First Statutory Fair Use Factor	11
2. In Evaluating the First Statutory Factor, Weight Should Be Given to the Importance of Parody and Satire as a Means of Comment and Criticism	15
B. Creative Parodies, Such as the Petitioners' Work, Should Prevail on the Second Fair Use Factor When They Parody a Published Work	17

TABLE OF CONTENTS—Continued

	Page
C. The Sixth Circuit Misapplied the Substantiality Test as it Pertains to Song Parodies	18
D. The Fourth Statutory Fair Use Factor Requires Proof That a Commercial Parody Will Harm the Copyrighted Work	20
1. The Sixth Circuit Erroneously Substituted a Commercial Use Presumption for Proof of Economic Harm	20
2. The Presumption Employed by the Sixth Circuit Will Have a Chilling Effect on Protected Speech	23
3. The Argument That a Parody Interferes With the Right of a Copyright Owner To Profit From Its Own Parodies Is Without Merit	25
4. A Failure To Base Infringement Decisions on Proof of Economic Harm Will Lead to Regulation of Parody Based on the Popularity and Political Acceptability of the Parodist	26
CONCLUSION	28
APPENDICES	
A. Declaration of William Strauss	1a
B. Declaration of Mark Russell	11a
C. Declaration of Barret E. Hanson	15a
D. Declaration of Bruce W. Kerr	18a
E. Declaration of Nancy Holson	23a
F. Declaration of Michael Huey	27a

TABLE OF AUTHORITIES

CASES	Page
Acuff-Rose Music, Inc. v. Campbell et al., 972 F.2d 1429 (6th Cir. 1992), *cert. granted*, 61 U.S.L.W. 3667 (1993)	*passim*
Acuff-Rose Music, Inc. v. Campbell et al., 754 F. Supp. 1150 (M.D. Tenn. 1991), *rev'd, Acuff-Rose Music, Inc. v. Campbell et al.* 972 F.2d 1429, (6th Cir. 1992), *cert. granted*, 61 U.S.L.W. 3667 (1993)	10
Benny v. Loew's, Inc., 239 F.2d 532 (9th Cir. 1956)	26, 27
Berlin v. E.C. Publications, Inc., 329 F.2d 541 (2d Cir. 1964)	12, 15, 16, 23
Bloom & Hamlin v. Nixon, 125 F. 977 (C.C.E.D. Pa. 1903)	15
Columbia Pictures Corporation v. NBC, 137 F. Supp. 348 (S.D.Cal. 1955)	27
Elsmere Music, Inc. v. NBC Company, 482 F. Supp. 741 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980)	12, 16, 18
Fisher v. Dees, 794 F.2d 432 (9th Cir. 1986)	6, 12, 16, 18
Folsom v. March, 9 F.Cas. 342 (No. 4901) (CC Mass. 1841)	4
Freedman v. Maryland, 480 U.S. 51 (1965)	24
Green v. Luby, 177 F. 278 (C.C.S.D.N.Y. 1909)	15
Green v. Mitsenheimer, 177 F. 286 (C.C.S.D.N.Y. 1909)	15
Harper & Row Publishers v. Nation Enterprises, 471 U.S. 539 (1985)	5, 14, 17, 20, 21, 26
Hill v. Whalen, 220 F. 359 (S.D.N.Y. 1914)	5
In re The Yoder Company, 758 F.2d 1114 (6th Cir. 1985)	21
Iowa State University Research Fund v. American Broadcasting Companies, 621 F.2d 57 (2d Cir. 1980)	5
Keep Thompson Governor Comm. v. Citizens For Gallen Comm., 457 F. Supp. 957 (D.N.H. 1978)	23, 24
Legille v. Dann, 544 F.2d 1 (D.C. Cir. 1976)	21

TABLE OF AUTHORITIES—Continued

	Page
Loew's, Inc. v. Columbia Broadcasting System, Inc., 131 F. Supp. 165 (S.D. Cal. 1955), *aff'd sub nom. Benny v. Loew's*, 239 F.2d 532 (9th Cir. 1956), *aff'd sub nom. Columbia Broadcasting System Inc. v. Loew's*, 356 U.S. 43 (1958) (affirmed *per curiam* by an equally divided Court)	26
MCA, Inc. v. Wilson, 672 F.2d 180 (2nd Cir. 1981)	28
Meeropol v. Nizer, 560 F.2d 1061 (2d Cir. 1977)	5
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)	24
Reeves v. General Foods Corp., 682 F.2d 515 (5th Cir. 1982)	21
Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992)	22
Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966)	23
Sid & Marty Krofft Television v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977)	23
Sony Corp. of America v. Universal Studios, Inc., 464 U.S. 416, 104 S.Ct. 774 (1984)	4, 21, 24
Speiser v. Randall, 357 U.S. 513 (1958)	23
Stewart v. Abend, 495 U.S. 207 (1990)	5
Twentieth Century Music Corporation v. Aiken, 422 U.S. 151 (1976)	4
Walt Disney Productions v. Air Pirates, 581 F.2d 751 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979)	27
Walt Disney Productions v. Mature Pictures Corporation, 389 F. Supp. 1397 (S.D.N.Y. 1975)	28
Warner Brothers, Inc. v. ABC, Inc., 720 F.2d 231 (2d Cir. 1983)	16, 17
Wright v. Warner Books, Inc., 953 F.2d 731 (2d Cir. 1991)	15

CONSTITUTION, STATUTES, AND LEGISLATIVE HISTORY

17 U.S.C. § 107, *amended by* PL 102-492 (1992)	3, 10, 17, 18, 20
Fed. R. Evid. 301	20
H.R. Rep. No. 1476, 94th Cong., 2d Sess. (1976)	10, 14

TABLE OF AUTHORITIES—Continued

	Page
S. Rep. No. 473, 94th Cong., 1st Sess. (1975)	10, 22
U.S. Constitution, Art. I, Sec. 8, Clause 8	4
U.S. Register of Copyrights, *Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law* (1961)	10

TREATISES

Ball, H., *Law of Copyright and Literary Property* (1944)	5
Goetsch, C., "Parody as Free Speech—The Replacement of the Fair Use Doctrine by First Amendment Protection," 3 *W. New England Law Review* 39 (1980)	13, 23
Moore, J. & H. Bendix, *Moore's Federal Practice* (2d ed. 1988)	21
Nimmer on Copyright (1992)	5

OTHER AUTHORITIES

Boswell, J., *Life of Johnson* (1970)	12
Fielding, H., *Shamela* (1741)	7
Howard, J.T., *Our American Music: A Comprehensive History from 1620 to the Present* (1965)	8, 13
Kitchin, G., *Survey of Burlesques and Parody in English* (1967 ed.)	7
Lawrence, V., *Music for Patriots, Politicians, and President* (1975)	8, 29
Patterson & Lindberg, *The Nature of Copyright: A Law of Users' Rights* (1991)	4, 25
Smith, G., *Joe Hill* (1969)	9
The Oxford Classical Dictionary (1970)	7
Wall Street Journal, Sept. 5, 1990	9

BRIEF OF AMICI CURIAE
IN SUPPORT OF THE PETITIONERS

Capitol Steps Productions, Inc. (hereinafter "The Capitol Steps"), Mark Russell, Barret E. Hansen, Bruce W. Kerr, Nancy Holson, and Michael R. Huey respectfully submit this brief as *amici curiae* in support of the Petitioners. Consents of the parties have been lodged with the Clerk.

STATEMENT OF INTEREST

The *amici* participating in this brief are engaged in the business of writing, performing, or playing musical satire and parody. The Capitol Steps have been performing, in Washington, D.C. and nationally, for eleven years. Declaration of William A. Strauss, hereinafter "Strauss Dec.," attached to the brief as Appendix A, ¶¶ 1-2. A Capitol Steps performance consists primarily of song parodies, principally of copyrighted songs.

Mark Russell has been performing parody in the Washington, D.C. area and nationally for nearly 40 years. He regularly appears on national network radio and television. For the past 18 years, he has hosted his own "Mark Russell Comedy Specials" on public television. Declaration of Mark Russell, hereinafter "Russell Dec.," attached to the brief as Appendix B, ¶¶ 2-3. Along with spoken material, Mark Russell performs song parodies to both coyprighted and original melodies.

Barret E. Hansen, professionally known as "Dr. Demento," has since 1970 conducted a weekly radio program consisting primarily of humorous songs, including song parodies. The program has been nationally syndicated since 1974, and is currently heard on approximately 100 stations nationwide. Declaration of Barret E. Hansen (hereinafter "Hansen Dec."), attached hereto as Appendix C.

Bruce W. Kerr is a professional singer and song parodist in Mountain View, California, and has been engaged in that profession for over twenty years. Decla-

ration of Bruce W. Kerr (hereinafter "Kerr Dec."), attached hereto as Appendix D.

Nancy Holson is the lyricist and producer of "The News in Revue," a musical political satire troupe currently performing in Westport, Connecticut. Declaration of Nancy Holson (hereinafter "Holson Dec."), attached hereto as Appendix E.

Michael Huey is the lyricist for "The Fabulous Bakersfield Boys," a musical satire group in Bakersfield, California. Declaration of Michael Huey (hereinafter "Huey Dec.), attached hereto as Appendix F.

The *amici* play or perform topical musical parodies without attempting to secure permission; in each case they have found that securing such permission is difficult or impossible. Strauss Dec., ¶¶ 4-7; Russell Dec., ¶¶ 6-8, ¶¶ 6-8; Hansen Dec., ¶¶ 6; Kerr Dec., ¶ 6; Holson Dec., ¶ 9; Huey Dec., ¶ 9.

The interest of the *amici* in this proceeding is quite clear. If it is unlawful for The 2 Live Crew to sing the song parody "Pretty Woman" except with the permission of the copyright owners of the underlying work, then it may be unlawful for any song parodist to play or perform musical satire or parody, and the world of both political discourse and musical fun may be impoverished. The *amici* are before this Court because the standard used by the Court of Appeals appears to apply with equal force to both political satire and outlaw rap. *Amici* therefore have a strong and direct interest in this Court reversing that ruling.

SUMMARY OF ARGUMENT

To prevent copyright protection of intellectual property from becoming a straitjacket, courts and the Congress have developed the doctrine of "fair use," which provides that copyrighted material may be quoted or copied verbatim under certain conditions. "Fair use" status has regularly been granted to those who quote from copyrighted works to explain or critique them, and to those who parody copyrighted works.

The "fair use" doctrine is now codified at 17 U.S.C. § 107, *amended by* PL 102-492 (1992). The legislative history of Section 107 makes clear that, in adopting that section of the law, Congress believed it was providing fair use protection for parody.

In this case, the Sixth Circuit found that a song parody performed by Petitioners was not a fair use. It reached this determination almost entirely on the basis of its undisputed finding that the parody was recorded in part for a "commercial" purpose. The test applied by the Sixth Circuit effectively rendered the four factor test embodied in the statute moot by holding that the "commercial" nature of the parody was dispositive when considering both the first and fourth tests. This emphasis on "commercial" purpose disregards the statutory language, and renders the statutory balancing test meaningless. The test applied by the Sixth Circuit would bring an end to musical political parody as it has existed since the time of the Revolution, and allow censorship by copyright of protected speech.

Parody and satire play an important role in our culture and are significant elements in the free expression of ideas. It is clear that they constitute a fair use. In applying the four part statutory test to the work at issue, the Court should (1) take into account the socially beneficial use of parody and satire, and (2) require that copyright holders seeking to suppress parodies exhibit proof of actual or potential economic damage.

ARGUMENT

This case presents the Court with a much needed opportunity to clarify a confused area of the law. While a well reasoned line of cases has held that legitimate parody is not a copyright violation because it is a fair use, some courts have reached the opposite decision. Often these rulings involve parodies that are obscene, in poor taste, or, as in the instant case, trenchant statements by controversial performers. The effect of decisions like that issued by the Court of Appeals below has been to allow

an erratic form of censorship by copyright, even where no conceivable economic harm has been suffered.

I. THE UNDERLYING PURPOSE OF THE COPYRIGHT LAW, AND THE SOCIAL VALUE OF SATIRE AND PARODY, WEIGH HEAVILY IN SUPPORT OF ANY CLAIM THAT A SPECIFIC SONG PARODY IS A "FAIR USE."

The purpose of the copyright law is to "promote the Progress of Science and the useful Arts. . . ." U.S. Consituation, Art. I, Sec. 8, Clause 8. To accomplish this end, the Constitution empowers Congress to secure "for limited Times to Authors . . . the exclusive right to their . . . writings." *Id.* In obedience to constitutional mandate, this Court has consistently held that, "[t]he immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the public good." *Twentieth Century Music Corporation v. Aiken,* 422 U.S. 151, 156 (1976) *quoted* in *Sony Corp. of America v. Universal Studios, Inc.,* 464 U.S. 416, 432 (1984).

The concept of "fair use" has been a central element in the law of copyright since at least the early nineteenth century. The first significant embodiement of the principal we now recognize as fair use is found in *Folsom v. March,* 9 F.Cas. 342 (No. 4901) (CC Mass. 1841), where Justice Story upheld both the right of certain authors to copy the works of others and the limit upon that right imposed by the copyright law.[1] Throughout the judicial development of the fair use doctrine, courts

[1] While fair use is generally seen as a limitation on the rights of copyright holders, Justice Story was actually extending the reach of copyright in *Folsom* by undercutting the "fair abridgement doctrine," favored in English law, which allowed almost any abridgement which did not qualify as a complete reprinting. Patterson & Lindberg, *The Nature of Copyright: A Law of Users' Rights* 67 (1991). But even while limiting abridgement from a copyrighted work, the fair use doctrine clearly allowed competitors to use copyrighted materials in competing works. *Id.* at 68.

have focused on whether a purported fair use "substituted" for the original:

> One test which, when applicable, would seem to be decisive, is whether or not so much has been reproduced as will materially reduce the demand for the original.

Hill v. Whalen, 220 F. 359, 360 (S.D.N.Y. 1914).

Fair use is " 'a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent'. H. Ball, *Law of Copyright and Literary Property* 260 (1944)." *Harper & Row Publishers v. Nation Enterprises,* 471 U.S. 539, 549 (1985). "The doctrine offers a means of balancing the exclusive right of a copyright holder with the public's interest in dissemination of information affecting areas of universal concern. . . ." *Meeropol v. Nizer,* 560 F.2d 1061, 1068 (2d Cir. 1977).

The purpose of the doctrine has always been to allow "courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." *Stewart v. Abend,* 495 U.S. 207, 236 (1990) (*quoting Iowa State University Research Fund v. American Broadcasting Companies,* 621 F.2d 57, 60 (2d Cir. 1980)). The social value of parody and satire, as demonstrated by their continuing importance in American history, together with the near impossibility of securing copyright licenses for satiric and parodic uses, supports a broad application of the fair use doctrine in this field.

A. The Fair Use Defense Is Essential to Parody and Satire.

The fair use defense is essential to artistic creativity in the realms of satire and parody. A satire of a copyrighted work "by its very nature is unlikely to be the subject of a license from the author of a serious work. Only by the recognition of a fair use defense is society likely to reap the benefit of this socially useful literary genre." 3 *Nimmer on Copyright* § 13.05[C] (1992).

This truism is exemplified by the instant case—in which Acuff-Rose declined The 2 Live Crew's offer to pay statutory royalties.

The declarations appended to this brief by *amici* further support this fundamental point. Attempts to secure licenses for parody uses of copyrighted songs almost invariably yield negative results. These include outright refusal,[2] simple failure to respond,[3] conditioning a grant of permission on complete surrender of all rights to the parody lyrics,[4] and even conditioning a grant of permission on use of the music publisher's lyrics rather than the parodist's.[5] While unconditional permission is occasionally granted to a few performers who have established a large commercial market for their parodies, it is often refused even for such performers. Hansen Dec., ¶¶ 6-8.

In short, the Ninth Circuit was correct in its finding that "[p]arodists will seldom get permission from those whose works are parodied." *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986).[6] Without protection afforded by the fair use doctrine, the writing of musical parody would be dangerous or impossible.

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[2] Russell Dec., ¶ 7; Huey Dec., ¶ 6; Kerr Dec., ¶ 5; Holson Dec., ¶ 6; Strauss Dec. ¶ 6.

[3] Huey Dec., ¶ 6; Holson Dec., ¶ 6.

[4] Huey Dec., ¶ 6; Kerr Dec., ¶ 4.

[5] Holson Dec., ¶ 7.

[6] In the "Mark Russell Comedy Special" which aired on the Public Broadcasting System on the evening of May 19, 1993, Mr. Russell sang a parody of "High Ho, High Ho, It's Off To Work We Go," the theme song of the seven dwarves from the movie "Snow White." In Mr. Russell's hands, the song was transformed into a musical commentary on recent reports that, during the "McCarthy period" of the 1950's, Walt Disney had reported to various federal authorities on the activities of individuals he believed to be subversive. Clearly, there was no possibility of Mr. Russell securing permission for this use of the song from its copyright holder, the Walt Disney Company. Russell Dec., ¶ 5.

B. The American Tradition of Musical Parody and Satire Is Worth Protecting.

The United States enjoys a rich tradition of social and political satire, including satire in musical form. An appreciation of the value of this tradition, in both its historical and current contexts, is critical in considering the application of the fair use doctrine to commercial song parody.

While satire and parody have their roots in ancient times,[7] they have always been at home in English literature. The first English satirical poem was probably Chaucer's "The Rime of Sir Thopas," which mocked chivalric ballads. Later, Alexander Pope cast "The Rape of the Lock" as a parody of epic poetry. The first novel in English, Samuel Richardson's *Pamela*, was published in 1740; the next year saw the publication of Henry Fielding's *Shamela*, whose style, characters, and plot were a direct parody of those in Richardson's novel.[8]

Song parodies are as old as satire itself. The first English song parodies were probably written during the seventeenth century struggles between the Puritans and the Royalists. Oliver Cromwell himself was satirized in "The

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[7] The parody epic poem *Margites* was generally attributed to Homer in antiquity, and was mentioned by Archilochus in the eighth century B.C. *The Oxford Classical Dictionary* 783 (1970). Later satirical authors of antiquity included Aristophanes ("The Frogs;" "Lysistrata"), and the Roman poets Juvenal and Lucian. Juvenal is probably best known for his comment that, in second century Rome at least, it was "difficult not to write satire" (*difficile est saturam non scribere*"). *Satires.* This remark bears a family resemblance to Mark Russell's frequent comment that comedy talent is not needed in Washington—"It's just rip and read."

[8] A portion of the lengthy subtitle of this work shows the intended connection. It begins, "An Apology for the Life of Mrs. Shamela Andrews, in which, the many notorious Falsehoods and Misrepresentations of a Book called Pamela are exposed and Rebutted. . . ." H. Fielding, *Shamela* (1741). *Shamela* was so commercially successful that Fielding followed up the next year with *Joseph Andrews*, another *Pamela* parody. *See generally*, G. Kitchin, *Survey of Burlesques and Parody in English* 169 (1967).

Roundheads and the Cavaliers," whose first line "Nanky Doodle came to town" may have been a remote source of "Yankee Doodle," perhaps the most distinctively American song of all time. V. Lawrence, *Music for Patriots, Politicians, and Presidents* 33 (1975).

A more immediate source of "Yankee Doodle," however, appears to have been an English song called "Lucy Locket" or "Fisher's Jig." The "Yankee Doodle" lyrics may have been written (and the title supplied) by an English army surgeon as a comment on the ragtag character of colonial troops in the French and Indian War. During the Revolutionary War, the words were rewritten, in numerous verses and variations, as an anti-British song. J.T. Howard, *Our American Music: A Comprehensive History from 1620 to the Present* 115 (1965). Other popular song parodies during the American Revolution included "The Liberty Song," penned to the tune of "Heart of Oak" by John Dickinson, later a framer of the Constitution, and "The Battle of the Kegs," by Frances Hopkinson, a signer of the Declaration of Independence.[9] After the Revolution, song parodies continued to be an important form of political expression. In addition to "The Star Spangled Banner," and "America" ("My Country 'tis of Thee"), the most stirring song to emerge from the Civil War, "The Battle Hymn of the Republic," began as a semi-humorous parody of an old southern camp meeting tune.[10]

Song parodies have always been a staple of American political life. They have been used by union organizers and their opponents, war protesters and war supporters, and social critics of all stripes to literally make their

[9] V. Lawrence, *supra*, at 26.

[10] The original song, "Say, Brothers, Will You Meet Us," was written before the war by William Steffe. By 1859, soldiers had begun singing that song with lyrics of their own—the most famous turning the song into "John Brown's Body." Julia Ward Howe heard Union soldiers singing that version, and wrote "The Battle Hymm of the Republic," which became the Union rallying cry for the rest of the war. Howard, *supra*, at 258-59.

voices heard on the issues of the day. Song parodies have important advantages over other forms of political expression. In the words of Joe Hill, the great I.W.W. songwriter and activist, "if a person can put a few cold, common sense facts into a song and dress them up in a cloak of humor to take the dryness off them, he will succeed in reaching a great number of workers who are too unintelligent or too indifferent to read a pamphlet or an editorial on economic science." Letter from Joe Hill to *Solidarity* (Dec. 12, 1914), *cited in* G. Smith, *Joe Hill* 19 (1969). An audio tape prepared by The Capitol Steps containing examples of song parodies through American history has been filed as Exhibit 1 to the Declaration of William Strauss.[11]

The tradition of using song parodies to address national and local political issues has gained renewed vigor in the last few years. For example, Barret Hansen, whose weekly syndicated "Dr. Demento Show" is the leading radio outlet for song parodies in America, received over 100 humorous songs regarding the Persian Gulf War, the vast majority of which were song parodies. Hansen Dec., ¶ 4. In an article discussing the numerous song parodies engendered by the Gulf War, the *Wall Street Journal* called political song parody "a time-honored tradition . . . Americans are the kind of people who appreciate this kind of thing." Wall Street Journal, Sept. 5, 1990 at A14, col. 3. This vibrant American tradition would be weakened or destroyed were this Court to agree with the Sixth Circuit in allowing music publishers to practice censorship by copyright.

C. Congress Intended That Parodies Be Protected as Fair Use When It Enacted Section 107.

When Congress enacted Section 107 in 1976, it expected parody to be covered by the newly codified definition of fair use. Both the House and Senate Reports spe-

[11] Source information on the audio tape (Exhibit 1) is set forth in Exhibit 2 of the Strauss Declaration.

cifically identified parodies as a form of fair use entitled to the protection of the statute. *See* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 65 (1976) ("House Report"). The Senate Report went so far as to indicate that parodies might be allowed to supplant some uses of the copyrighted original:

> With certain special exceptions (*use in parodies* or as evidence in court proceedings might be examples) a use that supplants any part of the normal market for a copyrighted work would ordinarily be considered an infringement.

S. Rep. No. 473, 94th Cong., 1st Sess. 61 (1975) ("Senate Report") (Emphasis added). The view that fair use should include parody had previously been recommended by the Register of Copyrights. U.S. Register of Copyrights, *Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law* 24 (1961). Congress clearly believed that it was continuing fair use protection for parodies.

II. THE PETITIONERS' SONG "PRETTY WOMAN" IS A FAIR USE OF THE COPYRIGHTED WORK.

The statutory formulation of the fair use test requires consideration of four *nonexclusive* factors. 17 U.S.C. § 107. Both The 2 Live Crew's commercial parody "Pretty Woman" and the social and political satire performed by *amici* are protected by the fair use doctrine.

A. Legitimate Parodists, Such as the Petitioners, Should Prevail on the First Fair Use Factor.

The first of the four fair use factors is:

> (1) the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes. . . .

17 U.S.C. § 107(1).

The majority and the dissent in the Court of Appeals, as well as the District Court, concluded that The 2 Live Crew song "Pretty Woman" was commercial parody.[12]

[12] The majority describes the "purpose" as both parody and commercial. *Acuff-Rose Music, Inc. v. Campbell et al.* 972 F.2d 1429, 1436 (6th Cir. 1992), ("Acuff-Rose II") *cert. granted*, 61 U.S.L.W. 3667 (1993). The dissent finds that the purpose is parody and the character commercial. *Id.* at 1443.

Acuff-Rose Music, Inc. v. Campbell et al., 754 F. Supp. 1150, 1154-55 (M.D. Tenn. 1991) ("Acuff-Rose I"), *rev'd, Acuff-Rose Music, Inc. v. Campbell et al.*, 972 F.2d 1429, 1435-36, 1443 (6th Cir. 1992) ("Acuff-Rose II"), *cert. granted*, 61 U.S.L.W. 3667 (1993). The opinions differ over whether the fact of commercial use is to be treated as dispositive for purposes of the first factor: the majority held that once a commercial use was found, the status of the work as parody was irrelevant;[13] the dissent held that commercial use, *per se*, did not determine whether this fair use factor was present or absent.

1. *The Sixth Circuit Erred in Finding That the Commercial Nature of a Parody Was Dispositive of the First Statutory Fair Use Factor.*

Traditionally, real song parodies, nearly all of which are done in part for a commercial purpose, are accorded no less respect for that reason than hypothetical, non-commercial parodies. Indeed, the cases finding parody to be a fair use *all* involve commercial parodies. *See, e.g.*,

[13] The majority opinion held "that the admittedly commercial nature of the derivative work—the *purpose* of the work being no less important than its *character* in the Act's formulation—requires the conclusion that the first factor weighs against a finding of fair use." *Acuff-Rose II*, 972 F.2d at 1437. The Court reached its decision that this result was "required" without any explanation and after a somewhat rambling statement that it would consider "whether 2 Live Crew met its burden to rebut the presumption by a defense, we note, requiring the court to be convinced that the 'parody does not unfairly diminish the economic value of the original.'" *Id.* A charitable reading of this section of the decision below would conclude that the Court had merged the first and fourth factors, impermissibly importing the economic harm element of the fourth factor into the first factor. As will be discussed *infra*, this error is compounded later in the decision when the Court determined that it could presume potential economic harm without a shred of support in the record. *Id.* at 1438.

Fisher (parody by commercial radio station personality found to be fair use); *Elsmere Music, Inc. v. NBC Company*, 482 F. Supp. 741 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980) (parody by commercial television network found to be fair use); *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir. 1964) (parody by commercial magazine found to be fair use). These decisions hold that the commercial nature of the parody, by itself, would not act to bar the fair use defense. One need not go so far as Dr. Johnson, who pithily stated that "No man but a blockhead ever wrote except for money," [14] to recognize that meaningful comment, whether satire, criticism or review, is generally undertaken in part for financial gain.

Today, scores of companies, groups, and individuals write, perform, and record political parody songs of copyrighted material, relying on the fair use doctrine for their protection from claims of copyright infringement. *See* Petition at 20. Whenever the song gains more than a purely local audience, these parodies are presented in part for commercial purposes. They are played on commercial radio stations, broadcast on commercial television networks, performed at concerts for which admission is charged, or recorded on tapes or discs which are sold to the public. There is simply no other route into the popular culture than through the marketplace; even were the parodists themselves to perform the work *gratis*, the act of transmitting this source of political discourse to the public is necessarily suffused with commercialism. Hansen Dec., ¶ 8; Holson Dec., ¶ 2.

Of course, this is not a new phenomenon. Parodists, like other writers and artists, have always engaged in their art in part for monetary reward. As one commentator has noted:

> It is obvious that the vast majority of authors combine both commercial and artistic motives in all their works. An author naturally wants to support himself and to convey his message, and to accomplish both

[14] J. Boswell, Life of Johnson 731 (1970).

> it is in his interest to sell as many copies or tickets as possible. . . . It was only the prospect of ameliorating his oppressive poverty that prompted Cervantes to begin writing *Don Quixote*. Henry Fielding wrote *Shamela* and *Joseph Andrews* in a desperate attempt to support his family after the Licensing Act of 1737 cut off his income by closing down his theater.

Goetsch, *supra*, at 44.

American song parodists have never shied away from receiving payment for their work. In 1798, the parody "Adams and Liberty," written to the tune of "To Anacreon in Heaven," paid its author a reported $750. Howard, *supra*, at 126. The sheet music for this song is believed to have been the first publication in America of the tune of our future national anthem. V. Lawrence, *supra*, at 148. One of the first successful American musicals was "The Tars from Tripoly," about American sailors fighting the Barbary Pirates. The entire show was adapted from an English ballad opera glorifying the Royal Navy. *Id.* at 183.

However phrased, the Sixth Circuit has established what amounts to a bright line test—if a parody is produced for a commercial purpose, it is not a fair use. The Court finds that commercial parody must fail the first test because its commercial purpose outweighs its status as parody; moreover, because the parody is commercial, economic harm must be presumed, thereby causing the work to fail the fourth test.[15] This result is totally inconsistent with the language and intent of the statute. Had Congress intended the result reached by the majority, it could have simply written the first factor as "whether such use is of commercial nature." It did not do so.

In formulating the statutory fair use doctrine contained in 17 U.S.C. § 107, Congress was subject to intense

[15] The Sixth Circuit has also cast the second and third factors in such a way that song parodies will always fail these tests. *See, infra*, at section B and C.

lobbying on the degree to which a schoolteacher could copy portions of a book for use by her class. House Report at 66. The dependent clause referencing the commercial or non-profit nature of a use was added largely to expand "fair use" to this area, not to limit the scope of fair use treatment:

> The Committee has amended the first of the criteria to be considered—"the purpose and character of the use"—to state explicitly that this factor includes a consideration "whether such use is of a commercial nature or is for non-profit educational purposes." This amendment is not intended to be interpreted as any sort of not-for-profit limitation on educational uses of copyrighted works. It is an express recognition that, as under the present law, the commercial or non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use decisions.

Id.

In deciding to afford controlling weight to the commercial character of a parody, the majority opinion relied heavily on *Harper & Row*. Yet nothing in that decision compels, or even suggests, that the commercial character of a contested fair use should be controlling in an analysis of the first factor. The Court weighed three factors in *Harper & Row* to determine the nature and character of the challenged use: the fact that the challenged use entailed news reporting; the fact that *The Nation* was a commercial magazine; and the fact that it had "the *intended purpose* of supplanting the copyright holder's valuable right of first publication." *Id.* at 562. (Emphasis in original.) It was clearly this last fact, and not the second, which tilted this Court's decision on the first fair use factor toward Harper & Row: "In evaluating character and purpose we cannot ignore *The Nation's* stated purpose of scooping the forthcoming hardcover and *Time* abstracts." *Id.* By contrast, in this case, no such intention to supplant or "scoop" the original melody of "Oh, Pretty Woman" has been found on the record of this case, or has even been alleged.

2. *In Evaluating the First Statutory Factor, Weight Should Be Given to the Importance of Parody and Satire as a Means of Comment and Criticism.*

It is clear from the case law and the legislative history that parody is an accepted fair use. Even the majority opinion below recognized that "the term parody must be either subsumed within the statutory terms 'criticism' or 'comment,' or be an entirely separate category of exception." *Acuff-Rose II*, 972 F.2d at 1435. The Second Circuit has held that this fact alone means that the defendant wins on the first statutory test:

> [T]here is a strong presumption that factor one favors the defendant if the allegedly infringing work fits the description of uses described in section 107. " '[I]f a book falls into one of these categories [i.e., criticism, scholarship or research], assessment of the first fair use factor should be at an end,' " (citation omitted) even though, as will often be the case, the biographer and publisher " 'anticipate profits.' " (citation omitted).

Wright v. Warner Books, Inc., 953 F.2d 731, 736-37 (2d Cir. 1991). This view has been implicitly adopted by most courts which have examined song parody.

In *Berlin*, the court rejected Irving Berlin's contention that *Mad Magazine* had infringed his copyright to various song lyrics.[16] The court expressly rejected the plaintiff's contention that *Mad's* use of his song lyrics was unfair

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[16] There are no reported cases prior to the twentieth century in which a copyright holder attempted to enjoin a satire of any type of work, or to sue for royalties from such a satire. The early twentieth century cases which are frequently cited on this subject, such as *Bloom & Hamlin v. Nixon*, 125 F. 977 (C.C.E.D. Pa. 1903), did not involve song parodies such as the one at issue here. In those early cases, vaudeville performers simply sang a copyrighted song while imitating the movements, voice, and attitude of a well kown performer. If one sets aside the vaudeville cases like *Bloom*; *Green v. Luby*, 177 F. 278 (C.C.S.D.N.Y. 1909); and *Green v. Mitsenheimer*, 177 F. 286 (C.C.S.D.N.Y. 1909), *Berlin* marks the first recorded case of which *amici* were aware in which a song parodist was sued for copyright infringement.

because *Mad* was a commercial magazine, holding that "as a general proposition, we believe that parody and satire are deserving of substantial freedom. . ." *Id.* at 545.

In *Elsmere Music, Inc. v. NBC Company,* the court protected as a fair use a Saturday Night Live parody of the "I Love New York" advertising jingle. The Second Circuit held that "in today's world of often unrelieved solemnity, copyright law should be hospitable to the humor of parody. . . ." 623 F.2d at 253.

In *Fisher,* the court held that a parody of "When Sunny Gets Blue" by a disc jockey on a commercial radio station was a fair use. In this case, the parties agreed that the parody was a "commercial use of the song." 794 F.2d at 437. The court recognized, however, that "many parodies distributed commercially may be 'more in the nature of an editorial or social commentary than . . . an attempt to capitalize financially on the plaintiff's original work.'" *Id., quoting Pillsbury Co. v. Milky Way Productions, Inc.,* 215 U.S.P.Q. 124, 131 (N.D. Ga. 1981).

Warner Brothers, Inc. v. ABC, Inc., 720 F.2d 231 (2d Cir. 1983), a non-musical parody case, affirmed a grant of summary judgment for the defendants in a case involving the alleged infringement of Warner's "Superman" copyrights by the television program, "The Greatest American Hero." The court contrasted the fair use of elements of the Superman persona in the television program with a previous infringing use of similar elements in a commercial for television sets and stereos. In doing so, it explained the importance of parody in terms directly applicable to this case:

> [A]n original work of authorship with elements of parody, though undoubtedly created in the hope of commercial success, stands on a different footing from the products of a discount chain. . . . After all, any work of sufficient notoriety to be the object of parody has already secured for its proprietor considerable financial benefit. According that proprietor further protection against parody does little to promote creativity, but it places a substantial inhibition upon the creativity of authors adept at using parody to entertain, inform, or stir public consciousness.

Id. at 242-43.

Musical parody and satire have provided the American people with a voice for their political sentiments—frequently a voice that had no other way to be heard. When the values associated with parody are weighed, particularly in the context of the congressional intent that parodies should qualify for fair use protection, this Court should reach the conclusion that "Pretty Woman" prevails on the first use factor, as do all legitimate parodies.

B. Creative Parodies, Such as the Petitioners' Work, Should Prevail on the Second Fair Use Factor When They Parody a Published Work.

The second fair use factor is:

> "(2) the nature of the copyrighted work. . ."

17 U.S.C. § 107(2).

In evaluating this factor, the *Harper & Row* Court said that the deference accorded an unpublished work is greater than that accorded a published work, and that the deference accorded creative works is greater than that accorded works of fact or reportage. 471 U.S. at 562. The opinion below addresses only the second of these propositions. The dissent gives consideration to both, and rightly concludes that the mere fact that the copyrighted work being parodied is "creative" can never be controlling in the case of a parody, because "it would make no sense at all to penalize the parodist for taking as his subject precisely the sort of work that has been grist for parodists' mills for the last two and a half millennia." *Acuff-Rose II,* 972 F.2d at 1444. When, as here, a parody takes for its subject a recognizable, previously published work, it should prevail on this factor.

C. The Sixth Circuit Misapplied the Substantiality Test as It Pertains to Song Parodies.

The third statutory factor is:

> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole. . . .

17 U.S.C. § 107(3).

The use of this statutory factor in the case of parody is, as the dissent has recognized, "problematical." *Acuff-Rose II*, 972 F.2d at 1444. A parody by its nature must, at a minimum, "conjure up" a sufficient portion of the copyrighted work to be recognizable as parody.

In the specific case of song parodies, the Second Circuit has endorsed a view of the "substantiality" factor which differs markedly from the restrictive view of the majority opinion in this case:

> [T]he concept of "conjuring up" an original came into the copyright law not as a limitation on how much of an original may be used, but as a recognition that a parody frequently needs to be more than a fleeting evocation of an original in order to make its humorous point. (Citation omitted.) A parody is entitled at least to "conjure up" the original. Even more extensive use would still be fair use, provided the parody builds upon the original, using the original as a known element of modern culture and contributing something new for humorous effect.

Elsmere, 623 F.2d at 253 n.1. Similarly, the Ninth Circuit has recognized a "special need for accuracy" in song parodies where a change of a few notes can make the melody unrecognizable, and destroy the intended musical joke. *Fisher*, 794 F.2d at 439.

The Sixth Circuit opinion simply makes no sense when applied to a song parody. Despite recognition of *Elsmere*, it finds that:

> The qualitative degree of the copying is even more critical than the quantitative, and we ask what degree of the essence of the original is copied in relation to its whole. (Citation omitted.) We conclude that taking the heart of the original and making it the heart of a new work was to purloin a substantial portion of the essence of the original.

Acuff-Rose II, 972 F.2d at 1438.

The flaw in this formulation is that every song has a recognizable tune. That tune constitutes its true "heart" or "essence." It is impossible to parody the song without musically quoting its tune. According to the majority opinion, once one does quote this "heart," one loses (or at least does not win) on this factor of the fair use test.

The genre of song parody, as practiced by Petitioners and the *amici*, consists largely of setting original lyrics to familiar tunes. Focusing on musical similarity ignores the creative heart of parody—the original lyrics created by the parodist and the "spin" which those lyrics place on the original song. If an existing work is not parodied directly, but is used as a vehicle for political or social satire, then the copyrighted material should contribute effectively to the satire.[17] When the copyrighted material is an effective part of the parody, the parodist should prevail on this test.

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[17] For example, The Capitol Steps song "I Wanna Be Your Pander Bear" is a satirical comment on campaign promises. But it was set to the music of "Teddy Bear," an old Elvis Presley song. Since President Clinton, the target of the song, has sometimes borne the nickname "Elvis," this selection adds a musical joke to the political lyrics. In the same vein, the song "Phantom of the Clarion" by the Fabulous Bakersfield Boys is a comment on the waste of building a huge uncompleted hotel. Huey Dec., ¶ 7. The use of the tune "Phantom of the Opera" musically evokes the underground chambers which were the setting of much of that play, and compares them to the interior of the unfinished hotel. Similarly, "The News in Revue" parodied the song "We'll Always be Bosom Buddies" to satirize the political backstabbing which occurred between Liz Holtzman and Geraldine Ferraro in the New York Senate primary during "The Year of the Woman." Holson Dec., ¶ 3. In each case, the parodist used the entire tune and meter of the original song, as well as scattered words, to make a devastating and original satiric point.

D. The Fourth Statutory Fair Use Factor Requires Proof That a Commercial Parody Will Harm the Copyrighted Work.

The fourth statutory factor is:

> (4) the effect of the use upon the potential market for or the value of the copyrighted work.

17 U.S.C. § 107(4).

This Court has called this fourth factor "undoubtedly the single most important element of fair use." *Harper & Row*, 471 U.S. at 566. The Sixth Circuit's holding that copyright holders win on this factor whenever a parody is "commercial" is the core error of its opinion.

1. *The Sixth Circuit Erroneously Substituted a Commercial Use Presumption for Proof of Economic Harm.*

Despite the importance of the fourth factor, the copyright holders in this case presented no evidence that the petitioners' parody had any effect on the market for its copyrighted work.[18] But the court below determined that there was no need for evidence. Having found that The 2 Live Crew's use of the copyrighted work was "wholly commercial," the Court "presume[d] that a likelihood of future harm to Acuff-Rose exists." *Acuff-Rose II*, 972 F.2d at 1438.

In reaching this rather startling presumption, the majority opinion relied upon *Harper & Row*. However, an evidentiary presumption, such as that announced by this Court in *Harper & Row*, has only a limited effect. Under Fed. R. Evid. 301, "a presumption imposes on the party

[18] On the other hand, The 2 Live Crew presented evidence that their parody did not constitute either a present or future danger to record sales of "Oh, Pretty Woman." Petitioners made this showing through the unrebutted affidavits of Oscar Brand and M. William Krasilovsky, which are attached as Appendices to the Petition. Both experts testified that the potential customers for The 2 Live Crew parody and the original Acuff-Rose song are entirely different and distinct.

against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial on the party on whom it was originally cast." Thus, the federal courts, through Rule 301, have adopted the "bursting bubble" approach to presumptions, under which the presumption vanishes, and has no further probative effect, once it has been rebutted. 10 J. Moore & H. Bendix, *Moore's Federal Practice* § 301.04[4.-1] (2d ed. 1988); *Reeves v. General Foods Corp.*, 682 F.2d 515, 522 n.10 (5th Cir. 1982); *Legille v. Dann*, 544 F.2d 1, 6-7 (D.C. Cir. 1976); *In re The Yoder Company*, 758 F.2d 1114, 1119-20 (6th Cir. 1985). In this case, the presumption had been rebutted by Petitioners' uncontradicted affidavits. This factor should therefore have been decided in Petitioners' favor.

In focusing on scraps of precatory language from *Sony* and *Harper & Row*, the Court of Appeals ignored the analysis which was actually performed by this Court in both of those cases. This Court found the "commercial use" presumption to be rebuttable in *Sony*, the very case in which it created the "commercial use" presumption. Notwithstanding the statement relied upon by the court below that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege which belongs to the owners of the copyright," *Sony*, 464 U.S. at 451, this Court held that the "commercial use" presumption had been rebutted through evidence showing that the *Sony* respondents' commercial video technology had fair and legitimate uses. In *Harper & Row*, the Court found no need to base its holding with respect to the fourth test on presumed damage: "Rarely will a case of copyright infringement present such clear-cut evidence of actual damage." *Harper & Row*, 471 U.S. at 567.[19] The "commercial use" presumption of *Sony* and

[19] The Court further noted that, in direct contradiction to this case, "the trial court found not merely a potential but an actual effect on the market." *Id.*

Harper & Row was not intended to, nor did it, overrule *sotto voce* the traditional fair use protection afforded commercial song parodies.

The Court of Appeals reversed the District Court on the fourth statutory test despite the absence of any evidence of actual or potential commercial harm. This effectively created an irrebuttable presumption that commercial use must always result in injury to the market for the copyrighted work.[20] By focusing on the commercial aspect of Petitioner's work, the court below collapsed the first and fourth factors, replacing them with a *per se* test of commercial benefit.

The lower court's holding that it would presume harm to the copyright holder as the result of a commercial parody, then find for the copyright holder on the basis of that presumed harm, is inconsistent with the legislative history of the copyright statute. The Senate Report accompanying the bill which became the Copyright Act of 1976 concluded just the opposite—that even if it could be demonstrated that a parody had supplanted a part of the normal market for the copyrighted work, the parody would not necessarily be construed as an infringement. Senate Report at 61.

The idea that a parodist or satirist rather than the copyright holder should have the burden of showing that commercial injury did not result from a parody or satire is

[20] In fact, the other case principally relied upon by the majority below, *Rogers v. Koons*, 960 F.2d 301, 312 (2d Cir. 1992), reached a contrary conclusion. In that case, the Second Circuit expressly recognized that the nature of the intended audience of even a direct copy of a work could require that it be treated as a fair use. According to the Court, "fair use permits lyrics or music to be copied in a literary magazine, but where the same material is published in a song sheet magazine, purchased for playing and not simply for reading, it is an unfair use." 960 F.2d at 312. This distinction is similar to the conclusion reached by the Petitioners' expert, Oscar Brand, who concluded that The 2 Live Crew's parody was intended for an entirely different audience than the original work, and could not "affect the sales or popularity of the Orbison song, except to stimulate interest in the original." Petition App. D, ¶ 19.

completely at odds with the realities of the music and publishing industries. It is the copyright holder or publisher who has direct access to sales records and reports of royalty revenues. If economic harm in fact has resulted from a satire or parody, it could only be demonstrable from those figures. It would be a double burden on the parodist to require him or her to first obtain the relevant data from the copyright holder through discovery, and then to mount an affirmative case of "no harm" on the basis of whatever data can be obtained through that process.

2. *The Presumption Employed by the Sixth Circuit Will Have a Chilling Effect on Protected Speech.*

A presumption such as that erected by the majority below raises grave constitutional doubts when applied to important forms of political and social expression such as parody and satire.[21] As this Court held in *Speiser v. Randall*, 357 U.S. 513, 526, presumptions which shift the burden of proof to an individual whose speech is claimed to be unlawful are constitutionally suspect:

> [W]here particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the law-

[21] Courts have sometimes held that the First Amendment offers no protection to copyright infringement, because the copyright laws protect only the expression of an idea, and not the idea itself. *See, e.g., Sid & Marty Krofftt Television v. McDonald's Corp.*, 562 F.2d 1157, 1169-71 (9th Cir. 1977). However, at least one commentator has taken vigorous exception to this result where parody directly mocks or criticizes a copyrighted work. C. Goetsch, "Parody as Free Speech—The Replacement of the Fair Use Doctrine by First Amendment Protection," 3 *W. New England Law Review* 39 (1980). Courts have also found that the fair use doctrine contains a public policy component with distinct First Amendment overtones. *See, e.g., Berlin*; *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966); and *Keep Thompson Governor Comm. v. Citizens For Gallen Comm.*, 457 F. Supp. 957 (D.N.H. 1978).

> fulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens. This is especially to be feared when the complexity of the proofs and the generality of the standards applied . . . provide but shifting sands on which the litigant must maintain his position. . . . "It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions."

The rule enunciated in *Speiser* has also been applied by this Court in litigation between private parties where that litigation impinged on First Amendment values. Most notably, in *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964), this Court relied on *Speiser* in holding that a state libel law which placed on critics of public officials the burden of showing their statements to be true was unconstitutional. *See also Freedman v. Maryland*, 380 U.S. 51 (1965) (burden of showing obscenity must rest with the censor). Thus, in a wide variety of arenas, presumptions which shift the burden of proof to a speaker, artist, or writer have been disapproved by this Court. The idea/expression dichotomy ordinarily employed to separate copyright decisions from First Amendment concerns provides no logical basis for reaching a different conclusion in setting fair use standards for parody and satire.

This Court should recall its perceptive observation in *Sony* that "[w]hile the law has never recognized an author's right to absolute control of his work, the natural tendency of legal rights to express themselves in absolute terms to the exclusion of all else is particularly pronounced in the history of the constitutionally sanctioned monopolies of the copyright and the patent." 464 U.S. at 432 n.13. For this reason, it is important that the Court announce, in the strongest terms, the rights of the parodist; otherwise, those who practice parody and satire will inherit a legacy of litigation and cost:

> There is no constitutional restraint on the copyright owners as to either their proprietary interpretation or their power to sue alleged infringers who disagree with their interpretation. The binding interpretation of copyright is thus up to the courts. That interpretation should be made not only in terms of the wording of the statute, but also in light of the free speech clause.

Patterson & Lindberg, *supra*, at 133.

3. *The Argument That a Parody Interferes With the Right of a Copyright Owner To Profit From Its Own Parodies Is Without Merit.*

A crucial link in the reasoning of the Sixth Circuit that a parody must always cause economic harm to a copyright owner was its holding that The 2 Live Crew parody would impair the market for parodies by the copyright holder. Its reasoning on this issue was 1) copyright owners have rights in derivative works as well as the original work; and 2) parodies are derivative works; therefore 3) copyright owners have rights in parodies of their own work which will be injured by the issuance of unlicensed parodies. *Acuff-Rose II*, 972 F.2d at 1439.

However, the second element of this syllogism is false; parodies are, under section 107, not derivative works, but rather "comment" and "criticism" on a work. The weakness in the Court's reasoning can be seen if one substitutes musical or theatrical criticism for parody. Assume that the *New York Times* writes a criticism of a copyrighted play. Clearly, this criticism is prepared and published for commercial purposes, *i.e.*, to sell newspapers and newspaper advertising. Could it then be said that the *Times* review was a copyright infringement because it unfairly interfered with the author's right to criticize his own work? This would truly be a remarkable result; yet it seems to be the result mandated by the majority's opinion. Needless to say, few if any of the great parodies of the past would ever have been written had the copyright holder of the original been the only person empowered to write them.

Of course, a different issue would arise if a reviewer or parodist simply intended to appropriate the original work. *Harper & Row*, 471 U.S. at 550. But this issue does not arise here, since the majority opinion of the court below has already determined The 2 Live Crew's intent to be parody, not piracy. *Acuff-Rose II*, 972 F.2d at 1435.

4. *A Failure To Base Infringement Decisions on Proof of Economic Harm Will Lead to Regulation of Parody Based on the Popularity and Political Acceptability of the Parodist.*

The fair use test enacted by Congress necessarily places this Court in the position of formulating specific fair use rules through a balancing of competing values. Even more than other courts which have considered the issue, the Sixth Circuit has tipped the balance too far in the direction of the copyright holder and against the free flow of comment and ideas. This Court should announce a test which restores that balance.

Proponents of the view that commercial parody is not protected as a fair use should take little comfort in the case law cited in support of that view. These cases lack any meaningful intellectual underpinning; on analysis, the only principal which can be gleaned from them is that unpopular, pornographic, tasteless or underfunded parodists may lose infringement suits, particularly if, as in this case, they have the misfortune to be sued in the hometown of the copyright holder.

The arbitrariness with which these decisions have been made can best be seen by contrasting *Loew's, Inc. v. Columbia Broadcasting System, Inc.*, 131 F. Supp. 165 (S.D. Cal. 1955), *aff'd sub nom., Benny v. Loew's*, 239 F.2d 532 (9th Cir. 1956), *aff'd sub nom., Columbia Broadcasting System Inc. v. Loew's*, 356 U.S. 43 (1958) (*affirmed per curiam* by an equally divided Court) (questioning whether there was any viability to parody defense to copyright infringement)[22] with the decision reached

[22] At the Circuit Court level, the decision in *Loew's* was upheld in part on the following rationale: "up to the time of the present

by the same District Court only months later in *Columbia Pictures Corporation v. NBC*, 137 F.Supp. 348 (S.D. Cal. 1955) (upholding a Sid Caesar burlesque of "From Here to Eternity" as a fair use). Unfortunately, in clearly retreating from his earlier decision in *Loew's*, Judge Carter chose to couch the distinction in terms of the fact that Sid Caesar only "conjured up" an appropriate amount in his parody, unlike Jack Benny, who presumably "over-conjured." This inserted into the law of fair use an extraordinarily subjective element which, unsurprisingly, has often been used to strike down parodies which fall outside the mainstream.

When the Ninth Circuit next addressed this issue in *Walt Disney Productions v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978), *cert. denied*, 439 US. 1132 (1979) it backed away from much of the substance of *Benny*,[23] but still found itself engaged in a murky examination of how much is too much. Faced with a comic book parody in which characters resembling Mickey Mouse and his compatriots were committing sexual acts, the Court engaged in an examination of how accurate the likenesses were and what level of caricature crossed the line of fair use.

Pornographic parody was again central to two decisions denying fair use status to a parody in the Second Circuit. In *Walt Disney Productions v. Mature Pictures*

controversy, no federal court in any adjudication, has supposed that there was a doctrine of fair use applicable to copying the substance of a dramatic work and presenting it, with a few variations, as a burlesque." *Benny v. Loew's, Inc.*, 239 F.2d 532, 536 (9th Cir. 1956).

[23] The Court's treatment of *Benny* hardly stands as a ringing affirmation of that decision: "The language in *Benny* concerning the substantiality of copying can be given a reading much more in keeping with the context of that case and the established principals at the time of that case if the opinion is understood as setting a threshold that eliminates from the fair use defense copying that is virtually complete or almost verbatim." *Air Pirates*, 581 F.2d at 756. "Thus *Benny* should stand only as a threshold test that eliminates near verbatim copying." *Id.* at 758.

Corporation, the use of portions of the Mickey Mouse March in a film entitled "The Life and Times of the Happy Hooker" was found to be an infringement on the grounds that "defendants used the song over and over again for substantially more time than is required to 'conjure up the original.'" 389 F. Supp. 1397, 1398 (S.D.N.Y. 1975). In *MCA, Inc. v. Wilson*, 672 F.2d 180, 185 (2nd Cir. 1981), the Court confronted a sexually oriented take-off on the song "Boogie Woogie Bugle Boy of Company B" by stating:

> We are not prepared to hold that a commercial composer can plagiarize a competitor's copyrighted song, substitute dirty lyrics of his own, perform it for commercial gain, and then escape liability by calling the end result a parody or satire on the mores of society.

As Judge Mansfield's powerful dissent points out, that decision was reached by trampling the standards previously set by the Second Circuit in *Berlin* and *Elsmere* solely because of the content of the parody:

> We cannot, under the guise of deciding a copyright issue, act as a board of censors, outlawing X-rated performances. Obscenity or pornography play no part in this case. Moreover, permissible parody, whether or not in good taste, is the price an artist pays for success, just as a public citizen must tolerate more personal attack than the average private citizen.

Id. at 191.

In summary, a consideration of the statutory factors with an eye to the nature of parody leads inexorably to the conclusion that the parody in question was a fair use. The Sixth Circuit's contrary conclusion is unsupportable on this record.

CONCLUSION

The 2 Live Crew and the *amici* purvey strikingly different versions of satire and parody. But legal interpretations aimed at unconventional or peripheral behavior must be evaluated in light of their potential impact on

speech which is at the heart of protected political discourse. However offensive the lyrics of "Pretty Woman" may strike some, it is not possible to subject them to censorship by copyright without imperiling a vibrant source of political speech which has flourished since the founding of the Republic.

Today, when political disputes frequently lead to short tempers and frayed nerves, political song parodists continue to serve the same purpose which historian Vera Brodsky Lawrence ascribed to them during the Civil War:

> People on both sides of the battle lines placed great reliance on the songs, finding in them a source of strength, courage, hope, much-needed laughter, and a general escape valve for the unbearable tensions of their lives. . . .

Lawrence, *supra*, at 341.

The Sixth Circuit has fashioned an interpretation of fair use, based almost entirely on the admitted fact that Petitioners are in the business of selling their record albums, that completely overturns the traditional protection afforded satire and parody. This crabbed interpretation of fair use disregards other critical values which Congress intended to be weighed.

Withdrawing protection for commercial parody and satire eviscerates fair use. This Court should reverse the lower court decision, and thereby affirm the historic role of these art forms in vitalizing political, social, and cultural discourse.

Respectfully submitted,

WILLIAM C. LANE *
DAVID CHARLES MASSELLI
TRACY ANN ROMAN
MASSELLI & LANE, P.C.
8260 Greenboro Drive
Suite 260
McLean, Virginia 22102
(703) 556-9550
Counsel for Capitol Steps Productions, Inc., Mark Russell, Barret E. Hansen, Bruce W. Kerr, Nancy Holson, and Michael R. Huey

Dated: May 28, 1993

* Counsel of Record

APPENDICES

APPENDIX A

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

No. 92-1292

LUTHER R. CAMPBELL, a/k/a LUKE SKYYWALKER,
CHRISTOPHER WONGWON, a/k/a FRESH KID ICE,
MARK ROSS, a/k/a BROTHER MARQUIS,
DAVID HOBBS, a/k/a MR. MIXX;
professionally known as THE 2 LIVE CREW;
LUKE SKYYWALKER RECORDS,
Petitioners,

vs.

ACUFF-ROSE MUSIC, INC.,
Respondent.

DECLARATION OF WILLIAM A. STRAUSS

1. My name is William A. Strauss. I am a Vice President and Director of Capitol Steps Productions, Inc., a Virginia corporation, and the paid, full time artistic director and co-lyricist for "The Capitol Steps," the company's musical and theatrical troupe. I have been with the troupe since its inception at a Christmas party on Capitol Hill, and have been a director and officer of the corporation since its formation. I am also an attorney and a member of the Bar of the District of Columbia.

2. The Capitol Steps have been performing in the Washington, D.C. area and nationally for eleven years. The group regularly performs on national network radio and television, including on such shows as "Nightline" and "Good Morning America," and at live shows around the country. The Capitol Steps produce and sell recordings of their songs and live performances. The group has performed for, and at the invitation of President Reagan

and President Bush (five times). We have also performed for President Clinton, for judicial conferences, and for probably three quarters of all current Members of Congress, none of whom have ever expressed to me the opinion that we were in violation of the copyright law. Both President and Mrs. Bush, many Members of Congress, and various Cabinet members have appeared on stage with us in our performances.

3. A Capitol Steps performance consists primarily of song parodies of copyrighted songs. The parodies, which generally have a high current political content, range in length from a few bars to an entire parody rendition. Recent examples are "I Wanna Be Your Pander Bear," to the tune of "Teddy Bear," a satirical jab at President Clinton; "Why Not Take Al and Me," to the tune of "Why Not Take All of Me," an often-updated barb at the Clintons and Gores; and "Day Care," to the tune of "Day-O," a look at the difficulties faced by President Clinton's nominees for Attorney General. Government officials have frequently brought visiting foreign officials to the Steps' shows as a jovial way of demonstrating the role of free speech in the American political process; Capitol Steps songs have also been broadcast on the Voice of America.

4. Our performances are a continuation of a long American tradition of musical parody. I have caused to be lodged with the Clerk of this Court, as Exhibit 1 to this declaration, a recording produced by The Capitol Steps entitled "From Yankee Doodle to Pander Bear: A History of American Musical Parody." The recording contains excerpts from 66 of our nation's most memorable and historically significant musical parodies. We produced the tape as a tribute to those who wrote and sang these songs, and as a teaching aid for teachers of American history in secondary schools and colleges. Exhibit 2 to this declaration is a list showing source material from which the songs heard on the tape and information regarding them were drawn.

5. The Capitol Steps do not seek or obtain licenses from copyright owners for two reasons. First, we have been advised by counsel that our songs constitute a "fair use" of the copyrighted material we use, and for which we give full, album-jacket credit to the original authors and composers. See the album notes to our twelfth and most recent album, "The Joy of Sax," submitted as Exhibit 3 to this declaration. Second, we have found that, in the business of social or political satire, obtaining permissions from song publishers is, for all practical purposes, impossible.

6. On one occasion, the producers of a network television show, against our advice, tried to get publisher permission to perform seven of our songs. After much time and discussion, permission was denied in six of the seven cases.

7. Asking permission for such uses is interpreted by music publishers as seeking their endorsement of the political ideas contained in our lyrics. Many copyrights are controlled by large corporations, such as Sony or Walt Disney, which have ongoing issues and relationships in Washington. These companies have no interest in endorsing barbed political satire directed at Members of Congress, the President, or even the federal judiciary. Nor do we wish to submit our lyrics to them for censorship. On the other hand, if we do not seek or obtain permission, then the ideas and lyrics of our songs—good or bad—are solely ours. And prior to the issuance of the *Acuff-Rose* decision by the Sixth Circuit Court of Appeals, no one had ever sued us for copyright infringement.

8. In our experience, song parodies cause no real or discernable harm to song publishers. People who book Capitol Steps shows, sit in our audiences, or buy our albums and tapes are interested in political satire, not in listening to melodies. Similarly, it is impossible for me to imagine someone who would be dissuaded from buying the original version of "Oh, Pretty Woman" because he already owned The 2 Live Crew's parody of that song.

9. Finally, the very nature of social and political satire makes it impossible to obtain timely permission. The Capitol Steps perform up-to-the-minute political satire based on current political events; the process of asking for and receiving permission would make it impossible for us to perform the kind of current repertoire which our audiences have come to expect.

10. I have carefully read the opinion issued by the Sixth Circuit Court of Appeals in this action. I am fearful that this opinion, unless reconsidered, would energize those who for whatever reason—including distaste for controversial ideas and opinions—may wish to quash song parodies as a popular form of political expression. Attached as Exhibit 4 to this declaration is a letter I received this month from Linda Santiago, Director, Copyright Administration for EMI Music Publishing, a British company that has become one of the largest copyright holders of American songs. The letter alleges that, simply because we sell our records, CDs, and tapes, our parody of songs such as "If I Only Had a Brain," from *The Wizard of Oz* is not a fair use. I believe that this letter may well represent the first tangible effect on The Capitol Steps of the Court of Appeals decision in *Acuff-Rose*.

I make the foregoing declaration under penalty of perjury this 26 day of May, 1993.

/s/ William A. Strauss
WILLIAM A. STRAUSS

EXHIBIT 2

Source Information for Song Parodies on Audio Tape—
"From Yankee Doodle to Pander Bear:
A History of American Musical Parody"

"American Spirit," "Jeffersonian's Song," and nonsense stanza, parodies of "Yankee Doodle"

I. Silber, *Songs America Voted By* 22, 25 (1971).
V. Lawrence, *Music for Patriots, Politicians, and Presidents* 33 (1975).
See also S. Foster Damon, *Yankee Doodle* (1959), a book devoted entirely to "Yankee Doodle."

Untitled parody ("Squish Into the Deep. . .") of "Hosier's Ghost"

Lawrence, *supra,* at 45.

"Liberty Song" and its untitled Tory parody ("Such Villains. . ."), both parodies of "Heart of Oak"

Id. at 26, 30.

Untitled parody ("In Bedlam Lofty. . .") of "The British Grenadiers

Id. at 36.

"American Parody" of "Rule Britannia"

Id. at 50.

"The Battle of the Kegs" parody of "Maggy Lauder"

Id. at 77.

"To Genet in New York" parody of "The Anacreontic Song"

Id. at 129.
See also Filby and E.G. Howard, *Star Spangled Books* (1972), about the "Star Spangled Banner."

"My Country 'tis of Thee," and "Rights of Woman," parodies of "Sally in Our Alley"

J. T. Howard, *Our American Music* 127 (1965).
Lawrence, *supra,* at 130, 262-63.

Untitled parody ("Those Hardy Knaves. . .") of "Nancy Dawson"
Lawrence, *supra,* at 75.

"Tip and Ty" parody of "Little Pig's Tail"
Id. at 268-69.

"The Log Cabin and Hard Cider Candidate," and "Bullet Proof," parodies of "Auld Lang Syne"
Silber, *supra,* at 40, 42.
For a general history/collection of song parodies from the 1840 campaign, see Lawrence, *supra,* at 265-99.

Untitled Whig parody ("Old Tip He Wears. . .") of "Yankee Doodle"
Id. at 282.

"Two Dollars a Day and Roast Beef" parody of "Rosin the Beau"
Silber, *supra,* at 52.

"Old Zack Upon the Track" parody of "Old Dan Tucker"
Id. at 57.
For general information on Steven Foster, see also Howard, *supra,* at 184-98.

"Democratic Song" parody of "Oh! Suzannah"
Silber, *supra,* at 65-66.

"Lincoln and Hamlin" parody of "Wait for the Wagon"
Id. at 82.

"A New Yankee Doodle" parody of "Yankee Doodle"
Republican Campaign Songster for 1864 15 (1864).

"Union Dixie" parody of "Dixie"
Silber, *supra,* at 85.
For information about Abraham Lincoln, see Lawrence, *supra,* at 427.

"John Brown's Body," "Battle Hymn of the Republic," and "White Soldier's Song," all parodies of "Say, Brothers, Will You Meet Us?"

Lawrence, *supra,* at 357, 362-63.
Silber, *supra,* at 87-88.
Howard, *supra,* at 258.

"Wide-Awake Yankee Doodle" parody of "Yankee Doodle"
Silber, *supra,* at 75.

"Good-By! Andy!" parody of "Jim Crack Corn"
Lawrence, *supra,* at 449.

Untitled ("Oh! Hearken to the glorious news. . .") and "When the Johnnies Get Into Power," parodies of "When Johnny Comes Marching Home Again"
Silber, *supra,* at 99, 116-17.

"His Grandfather's Hat" parody of "Grandfather's Clock"
Id. at 145.

"Now I am the Leader of the Democracee" parody of "When I Was A Lad"
Id. at 119-20.

"Grover's Veto," and "The White House Tom-tit" parodies of "Tit Willow"
Id. at 138, 182.

"Bryan Walked off with the Coveted Prize" parody of "The Band Played On"
Republican Campaign Parodies and Songs 5 (1896).

"A New National Anthem" parody of "America"
Silber, *supra,* at 154.

"Sing a Song of Labor" parody of "Sing a Song of Sixpence"
Republican Campaign Parodies and Songs 5 (1896).

Colorado Republican parody of "Oh, Dear, What Can the Matter Be?"
Silber, *supra,* at 163.

Untitled parody ("I Had a Job Once. . .") of "Ta-ra-ra Boom-de-ay"
B. Stavis, *et al., Songs of Joe Hill* 22 (1960).

"We Will Sing One Song" parody of "My Old Kentucky Home"
Id. at 24.

"We're All So Glad to Breathe the Air Again" parody of "When Johnny Comes Marching Home Again"
A Collection of Republican Parodies (1920).

"Eight Long Years of the Democrat Mule" parody of "The Erie Canal"
Library of Congress, Harding/Hobart Campaign Folder (1920).

"Kansas Suffrage Song" parody of "Old Dan Tucker"
Silber, *supra,* at 228.

"Keep Woman in Her Sphere" parody of "Auld Lang Syne"
I. Silber, "A Brief History of the Woman's Suffrage Movement" *Folkways Records, Album No. FH 5281* (1958), at 4.

"Kiss Yourself Goodbye!" parody of "Coming Through The Rye"
Silber, *Songs America Voted By* 259 (1971).

"That's Why We're Voting for Roosevelt" parody of "Marching Through Georgia"
Id. at 266.
See also, T. O'Dowd, *1936 Franklin Roosevelt Song Book* (1936).

"Landon, Oh, Landon" parody of "Oh! Suzannah"
Silber, *supra,* at 262-63.
Also, for a description of Hearst's parody writing contest, *see id.* at 263.

Untitled parody ("Frankin's Had More. . .") of "Oh, Dear, What Can the Matter Be?"
Silber, *supra,* at 275.

"Fare You Well" parody of "Tavern in the Town"
Id. at 275-76.

"Good Night, Perkins" parody of "Good Night, Ladies"
Id. at 278.

"Mister Congressman" parody of "Little Brown Jug"
W. Hille, ed., *The People's Song Book* 117 (1948).

"The Scabs Crawl In" parody of "The Worms Crawl In"
Id.

Parody with the same title of "I'm Just Wild About Harry"
Silber, *supra,* at 282.

"Adlai's Gonna Win This Time" parody of "Get Me to the Church on Time"
Id. at 292.

Special campaign parody version of "High Hopes"
Id. at 295.

"Hello, Lyndon" parody of "Hello, Dolly"
Id. at 297.

Untitled parody ("Oh, He Runs Hot. . .") of "Yankee Doodle"
J. Harris, lyrics. Published by A. A. Records & Harry Stoones, Inc. (1964).

Modern parody of "Hallelujah, I'm a Bum!"
B. Dane, *et al.,* "Songs of the G.I. Resistance" (record album lyric sheet) (1970).

"Hark When Gerald Ford Was King" parody of "Hark, the Herald Angels Sing;" "Ol' Man Gipper" parody of "Ol' Man River;" "I Wanna Be Your Pander Bear" parody of "Teddy Bear"
The Capitol Steps.

EXHIBIT 4

EMI MUSIC PUBLISHING
810 Seventh Avenue New York, NY 10019

Linda Santiago
Director, Copyright Administration

May 4, 1993

Mr. Bill Strauss
Capitol Steps Productions
1505 King Street
Alexandria, VA 22314

Dear Mr. Strauss:

I apologize for this delayed response with respect to whether or not your use of our songs is considered parody or fair use.

I sent your package to our attorney. Frederick Silber, and there is no question that your use of the songs is not fair use. You included those parodies on LP's cassettes and CD's which are being sold.

The fair use of a copyrighted work, for purposes such as criticism, comment, news reporting, teaching, scholarships or research is not an infringement of copyright. However, once that use is of a commercial nature it is no longer considered fair use.

I am requesting a complete and thorough listing of all EMI songs that you have included on recordings, together with record numbers, LP titles, release dates, etc. If I don't receive such list within a week of your receipt of this letter, legal action will be taken. If you have any questions you can contact Frederick Silber directly at 212-492-1248.

Sincerely,

/s/ Linda Santiago
LINDA SANTIAGO

cc: Landry, Rosenthal, Silber

APPENDIX B

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1992

No. 92-1292

LUTHER R. CAMPBELL, a/k/a LUKE SKYYWALKER,
CHRISTOPHER WONGWON, a/k/a FRESH KID ICE,
MARK ROSS, a/k/a BROTHER MARQUIS,
DAVID HOBBS, a/k/a MR. MIXX;
professionally known as THE 2 LIVE CREW;
LUKE SKYYWALKER RECORDS,
Petitioners,

vs.

ACUFF-ROSE MUSIC, INC.,
Respondent.

DECLARATION OF MARK RUSSELL

1. My name is Mark Russell. I am a political satirist.

2. I have been performing in the Washington, D.C. area and nationally and internationally for nearly 40 years. I have regularly appeared on national network radio and television For the past 18 years I have appeared on an every-other-month basis on the "Mark Russell Comedy Specials" on public television. I have appeared on nearly every national news show. I have been a regular contributor to "Good Morning America", and was a co-star of the NBC show "Real People".

3. I also appear in concert around the country. In 1992, alone, I appeared in more than 130 shows in 30 states, including those of the Sixth Circuit. I have appeared before the American Bar Association, the National Association of Broadcasters, and the Federal Communications Commission. I have appeared before, and at the

behest of nearly every president and vice president since Lyndon Johnson. I have also appeared at events at the request of former Chief Justice Warren Burger, numerous members of Congress, presidential candidates, governors and state representatives of both parties.

4. I trace my start in political satire to the suggestion of members of Congress and their staffs. In 1958, I was performing the works of others, including Tom Lehrer, in the Carroll Arms Hotel, in Washington. Since it was the closest bar to the Hill, it was where many Congressmen and their staffs ended their day. It was here that I began singing and talking about the events in Congress. As I wrote in the introduction to *Presenting Mark Russell* (Everest House Publishers, 1980), "my act is basically the same as it has been since 1961; only the names, as they say, have been changed to protect the retired and deceased."

5. Along with spoken material, I perform song parodies, to both copyrighted and original melodies. A current parody of a copyright work is "Disney" to the tune of "High Ho, High Ho" from Walt Disney's "Snow White and the Seven Dwarves." This song is a commentary on recent reports that during the McCarthy period of the 1950s, Walt Disney had reported to various federal authorities on the activities of individuals he believed to be subversive.

6. I do not seek nor do I obtain license from copyright owners for several reasons. First, I have been advised that my use of copyrighted songs constitutes "fair use" of the copyrighted material. Second, the very nature of social and political satire makes it impossible to obtain timely permission. When, for instance, it's known that the President has spent $200 on a haircut, it is not possible to wait more than the few hours necessary to write and memorize "He Looked Pretty" to the tune of "I Feel Pretty." When the video tape of the Rodney King beating became known, it was not possible to wait for more than the few hours necessary to write and memorize

"On The Streets of LA" to the tune of "On the Street Where You Live."

7. It is not possible to wait for permission because at 7 or 8 pm on a Friday evening there is no way to get in touch with someone who might be able to get in touch with someone from whom permission might be obtained: the story may not last more than one day—in which case the exercise of getting permission would be moot; and because audiences have come to expect comment in song on the topic of the day from me. To wait for permission means to disappoint an audience—something that I, as a professional performer would try never to do. On the rare occasion when permission has been requested it was denied. On one particular occasion, NBC made the request of the Disney Studios that just the first notes of its copywritten song "Chim-Chimney" be used to start my song about Gary Hart's trip to Bimini. I started my song "Bim-bimini".

8. Asking permission would also be interpreted by music publishers as a request for an endorsement of the political ideas contained within the lyrics. Since the comments contained within a song are mine, no endorsement is needed or wanted. In my nearly 40-year career I have never been sued for copyright infringement; nor has anyone ever claimed to be injured by what I have said or sung.

9. I see no real or discernable harm to song publishers from my performances. People who book Mark Russell, or purchase a ticket to one of my concerts or tune in to my television show do so because they want to hear what I am saying or singing about the current political scene. They are less interested in the song I parody; other than perhaps some in the audience will get the intended pun. Rather the audience is interested in what I am saying with the lyrics, whether they agree with the viewpoint or not. In addition, and most important, they are there to be entertained.

10. I have read the opinion issued by the Sixth Circuit Court of Appeals in this action. I am concerned that this opinion may cause colleges and organizations within the Sixth Circuit's jurisdiction who have considered booking me to look else where to fulfill their entertainment schedule rather than take the chance of becoming embroiled in a legal controversy. I also see a situation whereby I could sing a song in one state but not another, if this opinion were allowed to stand.

I make the foregoing declaration under penalty of perjury this 27 day of May, 1993.

/s/ Mark Russell
MARK RUSSELL

APPENDIX C

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1992

No. 92-1292

LUTHER R. CAMPBELL, a/k/a LUKE SKYYWALKER,
CHRISTOPHER WONGWON, a/k/a FRESH KID ICE,
MARK ROSS, a/k/a BROTHER MARQUIS,
DAVID HOBBS, a/k/a MR. MIXX;
professionally known as THE 2 LIVE CREW;
LUKE SKYYWALKER RECORDS,
Petitioners,

vs.

ACUFF-ROSE MUSIC, INC.,
Respondent.

DECLARATION OF BARRETT E. HANSEN,
p/k/a "DR. DEMENTO"

1. My name is Barret E. Hansen; I am professionally known as "Dr. Demento." Since 1970, I have conducted a weekly radio program consisting primarily of humorous songs. The program has been nationally syndicated since 1974, and is currently heard on approximately 100 stations, plus the Armed Forces Radio Network. In Washington, the program is heard weekly on WHFS-FM.

2. Parody songs have been a major part of the program from the beginning, and have become even more popular in recent years. Since my program is probably the major radio outlet for humorous songs in the United States, I receive dozens of taped parodies each month.

3. In addition to parodies by recognized artists such as "Weird Al" Yankovic and The Capitol Steps, I receive many parodies contributed by amateur and semi-profes-

sional artists from all walks of life. Some of these have become quite popular with my listeners.

4. I should explain that when I use the terms "parodies," or "parody songs," I include any kind of humorous song which uses an existing melody and original words to make a comment—whether the comment is directed at the underlying song or its performer, or at some political or social issue. Parody has proven especially fruitful as a vehicle for social and poliitcal commentary; of the more than 100 songs I received concerning the recent Persian Gulf conflict, the vast majority were parodies.

5. In the course of conducting my radio program, I am often in contact with parody aritsts, both amateur and professional, from around the country. As a result, I am probably as knowledgeable about current trends in musical humor generally, as anyone in the country. The statements I make in this declaration are based on that experience.

6. To begin with, the notion that permission for musical parodies is easy to obtain, or even obtainable at all in many cases, is simply not true. I have received many letters from people who have written song parodies, and have submitted them to the publishers of the originals before attempting to distribute them to me or anyone else in radio—mostly because they had read that Al Yankovic does it that way. Unfortunately, even those publishers openminded enough to give consent for an Al Yankovic parody (with its considerable income potential) are rarely inclined to give similar consent to an unknown parodist, whatever the merits of the parody.

7. Even Al Yankovic himself got his foot in the door, so to speak, by doing unlicensed parody early in his career. It was only after his songs gained airplay (mainly on the Dr. Demento Show), and one of them was released on record (thanks to the lucky chance that a member of the group being parodied happened to hear the parody on my program, and had an ample sense of humor) that Yankovic began to gather the "clout" to

have whatever negotiating power he now has. Moreover, even with his track record, Al has been turned down many times by publishers.

8. Second, I cannot see how a parody song could reach a wide audience today through strictly "noncommercial" means. The Dr. Demento Show, for example, is a commercial enterprise; and when people record and sell songs their purpose is generally at least in part commercial. To say that commercial parody cannot occur without permission from the copyright holder is for practical purposes the same as saying that no parody can occur without such permission.

9. The overly cautious and humorless attitude of music publishers has deprived the world of a chance to hear many truly excellent parodies through the years. An especially galling example, in my opinion, was the refusal of the copyright owners of *My Fair Lady* to grant permission to the late Allan Sherman to record his parodies of songs from that musical. Giving publishers the right to act as arbitrary censors, as that publisher did, is not consistent in my opinion with the American tradition of free speech and expression.

I make the foregoing declaration under penalty of perjury, this 7th day of May, 1993.

/s/ Barret E. Hansen
BARRET E. HANSEN
p/k/a Dr. Demento

APPENDIX D

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1992

No. 92-1292

LUTHER R. CAMPBELL, a/k/a LUKE SKYYWALKER,
CHRISTOPHER WONGWON, a/k/a FRESH KID ICE,
MARK ROSS, a/k/a BROTHER MARQUIS,
DAVID HOBBS, a/k/a MR. MIXX;
professionally known as THE 2 LIVE CREW;
LUKE SKYYWALKER RECORDS,
Petitioners,

vs.

ACUFF-ROSE MUSIC, INC.,
Respondent.

DECLARATION OF BRUCE W. KERR

1. My name is Bruce W. Kerr, p/k/a "Loose Bruce Kerr." Although I am a lawyer, licensed to practice law in Wisconsin, since 1972 I have made my living as a singer, songwriter, and song parodist in Mountain View, California.

2. I perform in several clubs in the area, as well as before groups such as the Kiwanis and Chamber of Commerce. I currently receive radio airplay for my musical parodies of politics and society on shows such as "The Rush Limbaugh Program" (song: "The Twelve Days of Clinton"), "The Dr. Demento Show" (song: "The Ballad of Woody & Mia"), the Jim Bohannon Show, and the CBS Radio Satellite Network. My parodies have closed out network news programs (e.g., "Gorby," CNN Network News, June 1990), have been heard on the Armed Forces Network ("Scudbusters"), and have received other forms of coast-to-coast radio and television coverage.

3. In 1977, I founded a music publishing company, "Marjorie Music Co.," which holds the copyright to my parody lyrics. In 1987, I founded a record company, "Broken Records," in response to receiving extensive radio airplay in California of a musical parody called "Walk Like a Deukmejian." The song was a parody of the number one hit song, "Walk Like an Egyptian," and concerned the political disputes between California's then-Governor and the former Chief Justice of the California Supreme Court, Rose Bird, who had just been ousted from office by the electorate. I recorded "Walk Like a Deukejian," and began receiving airplay for it, without applying for or receiving a copyright license.

4. After my parody began receiving airplay in California, I was contacted by the copyright holder of the original work, Peer International Corp., which demanded that I apply for a license to continue using my parody. They told me that they had already granted one license to "Walk Like an Egyptian," but had denied another. I did apply for a license, and after a six week wait learned that my application had been approved, but only on condition that I sign over all rights to my lyrics to Peer International. Since I certainly did not have enough money to engage in a legal battle with a music publisher, I agreed. Attached is a copy of my contract with Peer International Corp.

5. Another incident occurred in 1989, when I wrote a parody of Joni Mitchell's song, "Woodstock." My parody was called "Oldstock," and described how the "Woodstock generation" had aged in the twenty years since the festival had taken place. After submitting an audio tape of "Oldstock" to VH-1, a music video network, I was told that they would be interested in using the parody if I could secure permission from the copyright holder. I made application to Siquomb Publishing Co., which held the copyright to the original, but after

a delay in which they apparently submitted my lyrics to Ms. Mitchell for her review, permission was denied.

6. As a result of these and other experiences, I now perform parodies without seeking or obtaining copyright license. I avoid applying for such licenses because such applications are generally a waste of time, and I fear that a denial of a license might make subsequent airplay of the parody appear to be intentional infringement, and become the basis of legal action. Moreover, the time delays involved in applying for copyright permission are incompatible with the creation of song parodies relating to current events. It took me six weeks to receive permission for "Walk Like A Deukejian;" but I have had song parodies rejected for radio airplay because they were "one day stale."

7. It is my experience that, because of its peculiar nature, parody is sometimes the only effective vehicle to express a given satirical opinion of a current event, or to give voice to a commonly held public view on an issue. It seems to me that we should not let the copyright owner of a work that is sometimes a part of what is being mocked or commented upon disallow that expression. This specific collateral use of an "underlying work," which we call parody, should be kept free in a society which wishes to stay so.

I declare that the foregoing is true, to the best of my knowledge and belief, under penalty of perjury, this 18th day of May 1993.

/s/ Bruce W. Kerr
BRUCE W. KERR

EXHIBIT 1

Date: 2/23/87

PEER INTERNATIONAL CORPORATION
1740 Broadway
New York, New York 10019

Gentlemen:

We hereby confirm our request for your permission to use your copyrighted musical composition entitled, WALK LIKE AN EGYPTIAN composed by Liam Sternberg, as outlined below:

As your employees-for-hire I will compose a parody under the title, WALK LIKE A DEUKMEJIAN containing your music and the lyrics annexed and marked Exhibit A.

As your employees-for-hire, you will own the said parody and all rights therein including the copyright as a work for hire throughout the world.

I am not to receive any compensation as a composer of the parody or otherwise for any present or future use of said parody.

Your ownership of the copyright in said parody is entirely unencumbered and without any obligation to compensate me.

In the event that I produce phonorecords embodying the parody I shall be required to obtain from you a separate mechanical license authorizing said use, which license shall provide for a royalties rate of five ($ .05) cents per copy for each phonorecord manufactured and I will pay you in advance upon the signing of such license a fee to cover the initial pressing of 500 units.

Very truly yours,

/s/ Bruce Kerr
BRUCE KERR
c/o Loose Bruce Productions
413 Vasquez Avenue
Sunnyval·, CA 94086

AGREED TO:

PEER INTERNATIONAL CORPORATION

by /s/ Cecile Russo
CECILE RUSSO
Assistant Vice President
of Copyright and Licensing

APPENDIX E

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1992

No. 92-1292

LUTHER R. CAMPBELL, a/k/a LUKE SKYYWALKER,
CHRISTOPHER WONGWON, a/k/a FRESH KID ICE,
MARK ROSS, a/k/a BROTHER MARQUIS,
DAVID HOBBS, a/k/a MR. MIXX;
professionally known as THE 2 LIVE CREW;
LUKE SKYYWALKER RECORDS,
Petitioners,

vs.

ACUFF-ROSE MUSIC, INC.,
Respondent.

DECLARATION OF NANCY HOLSON

1. My name is Nancy Holson. I am one of the producers and the lyricist for "The News in Revue," a musical satire troupe currently located in Westport, Connecticut. "The News in Revue" performs musical political satire on local and national issues. The production, which was originally performed in workshop as "The News" in Norwalk, Connecticut, ran eight shows per a week as an Off Broadway show in New York City from July to Election Day of November, 1992. It currently runs in Westport every Saturday night and for private events.

2. The upfront production costs for a production such as "The News in Revue" are enormous. For example, an enormous investment was necessary for start-up costs to perform the show Off Broadway. Other unavoidable costs include advertising and paying full-time employees ("The

News in Revue" has employed as many as seventeen employees at one time). In order to pay back the original investment and keep the production going, it is absolutely necessary to run "The News in Revue" as a commercial venture.

3. The songs used in "The News in Revue" satirize both local and national politics. For example, when we were performing in New York we used the song "We'll Always be Bosom Buddies" from "Mame" to satirize the political back-stabbing which occurred between Liz Holtzman and Geraldine Ferraro in the New York Senate Primary, a satire which had special comedic force, given that 1992 was termed "The Year of the Woman." This song was chosen because it seemed uniquely suited to convey the humor inherent in the situation. National political parodies have included Dan Quayle singing an angry duet with Murphy Brown to the tune of "The Lady is a Tramp," and Marilyn Quayle espousing her particular brand of less-than-equal rights with a parody of "I Enjoy Being a Girl" from "The Flower Drum Song." Once again, both these songs were selected because they were particularly well-suited for communicating the humorous message which we were attempting to convey.

4. When we decided to open Off Broadway, we were concerned about relying on the fair use doctrine of copyright law to protect us from potential litigation. After interviewing at least five attorneys and being advised that the fair use doctrine was a rather unsettled and murky one, we decided to pursue the route of attempting to obtain and pay for releases from the copyright owners of the songs which we used in our productions.

5. We initially sought the assistance of a specialist in obtaining copyright permissions, and after paying her nearly $1,300.00 we learned that she was unable to obtain a single clearance. We then turned to our attorney, who after the expenditure of much time and labor, and at the expense of over $10,000.00 in attorney's fees, came

up with similar results after submitting requests to use approximately twenty songs.

6. In attempting to gain releases, our attorney contacted either the music publisher or the songwriter or his representative. In denying our requests, the publishers or songwriters gave us a variety of reasons. For example, one publisher denied our requests for the use of several songs because he felt that the use of standards in a political satire could be detrimental to the song itself and at odds with the writer's view as to the song's use and creation. In the two or three cases where our requests were even considered, the approvals were contingent upon a number of conditions: we would have to submit the proposed lyric modifications to the publisher for approval (which approval could be withheld for any reason), we would have to transfer the ownership of any modified lyrics over to the publisher, and the scope of the permitted use would be restricted by the publisher.

7. In one case, the copyright holder not only denied our request for a release, but also suggested changes in the meter and rhyme pattern of our proposed parody. A copy of the response we received to our request for the use of "Don't Get Around Much Anymore" is attached hereto as Exhibit 1. The suggested changes altered the actual content and intent of the lyrics which we had originally submited to the copyright holder. Our song was meant to lampoon the recent, belated decision to place a bust of Spiro Agnew in the Capitol Rotunda. A copy of our proposed lyrics is attached hereto as Exhibit 2. The modified lyrics suggested by the copyright holder do not even mention the bust or the controversy surrounding it, and thus totally miss the point of the our parody. We ultimately decided not to pursue obtaining this release any further, as we felt that we should not be required to modify our lyrics to conform to the copyright holder's aesthetic sensibilities.

8. Ultimately, we were only able to secure one agreement with one publisher, Warner/Chappell, to use two

Cole Porter songs, only one of which was used in "The News in Revue." With regard to the other requests, we decided that the conditions placed upon our use of the songs were too onerous to merit the obtaining of a release, especially given the timely political content of our production. In the time in which it would take to obtain an approval of our lyric modifications, the political commentary of our parodies would lose its humor and grow stale; waiting to obtain pre-approval of our parodies would esentially make performing "The News in Revue" impossible.

9. After much discussion, we decided to go ahead with the New York production of "The News in Revue" irrespective of our inability to gain copyright releases for the songs used in the production. Although there are elements of the fair use doctrine which are not clearly defined, we believed that the intent of the doctrine was to protect the ability of satirists such as ourselves to make social and political commentary. We decided that our show was worth the risk.

I make the foregoing declaration under penalty of perjury, this 17 day of May, 1993.

/s/ Nancy E. Holson
NANCY HOLSON

EXHIBIT 1

HARRISON MUSIC CORP.
INTERNATIONAL MUSIC SERVICE
6253 Hollywood Blvd., Suite 807
Hollywood, Ca. 90028

Tel: (213) 466-3834
Fax: (213) 469-6411

FAX TRANSMISSION FAX # 212-956-2164

DATE: 6/8/92

To: Harvey S. Epstein

COMPANY: Robinson Brog ETC

FROM: Harrison Music Corp.

RE: Parody for "DON'T GET AROUND MUCH ANYMORE"

TOTAL NUMBER OF PAGES, INCLUDING FRONT COVER ————

IF YOU DO NOT RECEIVE THE FULL TRANSMISSION OF THIS FAX, PLEASE CONTACT THE FAX OPERATOR ON (213) 466-3834 IMMEDIATELY QUOTING THE ABOVE REFERENCE.

ADDITIONAL INFORMATION: To reply to your letter of June 3rd, we fully understand your request for approval for the use of our property but in the interest of preserving the integrity of our copyright we would suggest some changes. Although we respect the political intent our preference is to adhere to the original meter and rhyme pattern.

The present parody does not meet our standard for this outstanding and valuable copyright.

Although we wish your clients the best of luck with their project we do not give permission to use their present parody.

/s/ Molly Hyman
MOLLY HYMAN

HARRISON MUSIC CORP.
6253 Hollywood Blvd., Suite 807
Los Angeles, CA 90028
(213) 466-3834, 466-0453
FAX (213) 469-6411

EXAMPLE

Parody for "DON'T GET AROUND MUCH ANYMORE"

Verse:

Had lots of fun in Washington
But now a quiet life have I
If they want me to make the run
Believe me they've got the right guy.

Chorus:

Missed the Watergate trials
All the blood and the gore
Missed the pardon from Jerry
Don't get around much anymore.

Missed the chance to preside
On the old Senate floor
How I miss the debating
Don't get around much anymore.

Left in disgrace
My life was a mess
Now they want my face
Back at the old address.

Etc. etc. etc

EXHIBIT 2

Nancy Holson's Parody of *Don't Get Around Much Anymore* (as sung by Former Vice President Spiro Agnew)

No more a life in Washington,
A quiet, private life have I.
Now they want to hang my picture up
And I'm back in the public eye.

Missed the Watergate trials,
That was lucky for sure.
Missed the pardon from Jerry.
Don't get around much anymore.

Missed the chance to preside
On the senate floor.
How I miss the debating.
Don't get around much anymore.

Left in disgrace,
My life asunder.
Now they want my face
Back in the rotunda.

Silent majority spoke.
Coined that phrase way back when,
Spiro A's back in fashion,
So I might get around again.

(Blackout)

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1992

No. 92-1292

LUTHER R. CAMPBELL, a/k/a LUKE SKYYWALKER,
CHRISTOPHER WONGWON, a/k/a FRESH KID ICE,
MARK ROSS, a/k/a BROTHER MARQUIS,
DAVID HOBBS, a/k/a MR. MIXX;
professionally known as THE 2 LIVE CREW;
LUKE SKYYWALKER RECORDS,
Petitioners,

vs.

ACUFF-ROSE MUSIC, INC.,
Respondent.

DECLARATION OF MICHAEL HUEY

1. My name is Michael Huey, M.D. I am the Director of the Student Health Service at California State University, Bakersfield campus.

2. I am also a member of, and the lyricist for "The Fabulous Bakersfield Boys," a four singer musical comedy satire group in Bakersfield, California. The group first performed in 1990, and has grown in local popularity; we performed 50 shows in 1992. Although we work principally in Bakersfield and Kern County, we have also performed in San Diego, Los Angeles, and San Francisco.

3. Our songs primarily satirize local Bakersfield issues and personalities. For example, last year we sang "I Wrote the Checks, But the Checks Bounced" (to the tune of "I Fought the Law, But the Law Won"), a song about our local congressman's involvement in the House check writing scandal. Occasionally, however, we do venture into state and national politics, social issues, and even international events (including Desert Storm and

the British royal family). Generally, the group performs for business banquets, Chamber of Commerce meetings, and the like. Our gross receipts for 1992 were $25,000.

4. In the summer of 1992, we decided to cut our first record album. Because we were unsure as to our legal position, we contacted The Harry Fox Agency, Inc. in New York (the principal licensing agency for rights to record copyrighted music). They informed us that we must have "written permission" from the copyright holder for any song parody, so we mailed request letters for twelve songs. In each case, we offered to pay copyright royalties.

5. We received one immediate approval, then nothing else for weeks. However, since we hoped to have the album ready in time for Christmas, we decided to proceed with recording the songs.

6. We spent hours in the studio, and over $1,200 cutting the twelve songs, but the difficulties of obtaining "written permission" became increasingly painful and disillusioning. Two songs were refused outright, even after tapes of our recorded parody were sent for approval. Two other songs were initially refused by the publisher, but later approved when I contacted the agent for the writers directly. Two others were approved by the publisher after several contacts. All four of these approvals were accompanied by a requirement that we sign over all right for the lyrics to the publisher for $1, and agree never to claim authorship of the lyrics in writing or verbally. The final tally: one immediate approval, four delayed and conditional approvals, and two refusals. Five of our requests have been ignored entirely.

7. One of the songs for which we were denied permission was "Phantom of the Clarion," a parody version of "Phantom of the Opera." Our version satirizes a hotel which was supposed to be built adjacent to the Bakersfield convention center, but which remains nothing but a steel skeleton after the expenditure of millions of dollars in public and private funds. Because this is probably

our most popular song, I made multiple attempts to obtain approval, but to no avail.

8. Christmas 1992 came and went, and the album still sits on the shelf. At one point, the group nearly split up over this album mess. Two partners (including myself) wanted to proceed under the "fair use" doctrine, despite the refusals. The other two members refused over fear of a lawsuit. They contended that even the *successful* defense of a copyright lawsuit would destroy the group financially. We remain in limbo as the songs age and lose their topicality.

9. Our experience leads me to several conclusions. First, I do not see how our song parodies could possibly hurt the copyright holder. Our most popular songs are those we write about local political issues and personalities. I do not see how anyone could believe that "Who Wants to Buy Gosford and Ming," a song about the difficulties faced by a local developer at a particular Bakersfield intersection (not on the "album"), could take revenue away from "Who Wants to Buy this Diamond Ring," an old Gary Lewis and the Playboys hit from the 1960's. Yet, even though we offered to pay royalties on every song, seven of the twelve publishers we approached either turned us down or ignored our request for permission.

10. Second, the process of obtaining permissions is so drawn out and problematic that it is impossible to do parody recordings of songs about controversial political issues if permission is required. For example, our check writing song is now old news.

11. Finally, social and political song parody is an American art form with over two centuries of history. Our experience demonstrates to me that puting it into the shackles of a copyright licensing process would effectively eliminate it as an art form, except when performed at such a small scale that it escapes notice by the copyright censors. This result would also eliminate one avenue for the free flow of ideas and opinions that has always characterized American life.

I declare that the foregoing is true, to the best of my knowledge and belief, under penalty of perjury, this 4th day of May, 1993.

/s/ Michael Huey, M.D.
MICHAEL HUEY, M.D.